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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1221

INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, AND BIRD & SON, INC. OF MASS.,

Petitioners,

vs.

EARL J. SMITH,

Respondent.

Petitioners' Reply Memorandum

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This brief is addressed to the "Memorandum for the Respondent" submitted by the Solicitor General.

Respondent's "belief" that this action is indistinguishable from a case presently before this Court, *Alabama Power Co. v. Davis*, No. 76-451,[1] is based upon a misapprehension of the proper inquiry to be made in determining whether a given benefit is a perquisite of seniority to which a returning veteran is entitled to by virtue of The Selective Service Act of 1948, 62 Stat. 614 (50 U.S.C. App. § 459).

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1. Certiorari granted January 10, 1977, argued April 25-26, 1977.

This Court in *Foster v. Dravo Corp.*, 420 U.S. 92, 99-100 (1975) held that the *particular agreement* which creates the benefit in question must be examined to determine whether the benefit is measured by time on the payroll or is a bona fide effort to compensate for work actually performed. If under the particular agreement the benefit is measured by time on the payroll, it is a perquisite of seniority and protected by the statute. If the benefit is a bona fide effort to compensate for work actually performed, it is not so protected.

Respondents' assertion here and in *Alabama Power Co., supra* (brief for respondent in *Alabama Power,* pp. 10-22), that the determination of whether pension benefits are perquisites of seniority is somehow resolved by the philosophical inquiry into the "real nature" of pension benefits was not only disapproved by this Court in *Foster v. Dravo Corp., supra,* but by every court which has addressed the question except the court below here.

The proper inquiry is whether the pension benefit in the *particular agreement* under scrutiny is based upon a *substantial work requirement.* In *Litwicki v. Pittsburgh Plate Glass Ind., Inc.,* 505 F.2d 189 (3rd Cir. 1974), the court held:

> "Our analysis of *this pension agreement* leads us to the firm conclusion that the benefits therein provided are not perquisites of seniority under the Act." (Emphasis added.)

In *Jackson v. Beech Aircraft Corp.,* 517 F.2d 1322 (10th Cir. 1975) the court held:

> ". . . we are of necessity limited to an examination of the agreements from which the benefits arise in our effort to ascertain their true nature." (517 F.2d at 1325.)
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> * * *
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> ". . . we . . . are of the view that the retirement income *benefits provided by the plan* are not a form of seniority, as such, but are based on a substantial work requirement." (Emphasis added.) (517 F.2d at 1326.)

And, in *Davis v. Alabama Power Co.,* 383 F.Supp. 880, 889 (N.D. Ala. 1974), *aff'd per curiam,* 542 F.2d 650 (1976), *cert. granted,* No. 76-451, Jan. 10, 1977, the trial court held,

> "This court is of the considered opinion that, as has previously been pointed out, there is no evidence in this case to show that *the pension plan* is based upon any 'unit of work' requirement." (Emphasis added.)

As originally stated, the question presented by this petition and the *Alabama Power* case is:

> "Do the seniority provisions of the Military Selective Service Act require military service to be credited in computing the amount of retirement income under privately funded pension plans *even though under such pension plans the amount of retirement income is dependent upon a substantial work requirement?*"

This issue is squarely before the Court here because it is undisputed that pension benefits are conditioned upon a substantial work requirement (see Ninth Circuit Opinion below, Appendix A to our original petition, page 3, fn. 4). The *Alabama Power* case does not necessarily present the same issue because it may properly be found that the pension plan there does not contain a work requirement. Clearly, if this Court agrees with the finding of the trial court in *Alabama Power* that the agreement creating the pension benefits did not contain any work requirement, *Alabama Power* necessarily will be resolved without ever reaching the question presented by our petition.

We respectfully submit that the two cases are clearly distinguishable on the facts and thus deferral pending decision in *Alabama Power* does not guarantee the resolution of the issue squarely presented by our petition.

There is another reason why the petition should be granted. Within the foreseeable future, say twenty years from now, every employer which has a retirement program will face two payrolls:

the active employees and the retirees. It is at least doubtful that the economy can support this duality of payment no matter how carefully it has been budgeted and pre-planned. It is well-nigh certain that the economy cannot support it if that budgeting and pre-planning is skewed and made meaningless by a proliferation of retirees, not anticipated nor planned for despite a careful review of the existing law, but made eligible only by judicial fiat which upsets or ignores prior settled law.

Dated: San Francisco, California, May 12, 1977.

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